

Nos. 15461-15462

United States
Court of Appeals
for the Ninth Circuit

L. H. PIERCE,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

LENA L. PIERCE,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
District of Oregon

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	11
Attorneys, Names and Addresses of.....	1
Certificate of Clerk.....	37
Complaint	3
Ex. A—Claim for Refund.....	9
Bond on Appeal.....	35
Findings of Fact and Conclusions of Law.....	25
Judgment, Cause No. 7828.....	31
Judgment, Cause No. 7829.....	32
Notice of Appeal, Cause No. 7828.....	34
Notice of Appeal, Cause No. 7829.....	34
Order Extending Time for Filing Record and Docketing Appeal	36
Pretrial Order	14
Statement of Points on Appeal, Cause No. 15461	41
Statement of Points on Appeal, Cause No. 15462	42
Stipulation for Consolidation and Submission of Cases, Etc.....	43
Order Re	44

NAMES AND ADDRESSES OF ATTORNEYS

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C. E. LUCKEY,

United States Attorney;

EDWARD J. GEORGEFF,

Assistant United States Attorney,

United States Courthouse,

Portland, Oregon,

For Appellee.

In the District Court of the United States
for the District of Oregon

Civil No. 7828

L. H. PIERCE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the Plaintiff and for cause of action against the Defendant complains and alleges as follows:

I.

This is a civil action and arises under the laws of the United States of America providing for Internal Revenue and jurisdiction rests upon Title 28, United States Code, Section 1346.

II.

During the years 1946 and 1948, Plaintiff was a resident and inhabitant of the County of Multnomah and State of Oregon and was then and is now a citizen of the United States of America.

III.

Defendant now is and during all times herein mentioned was a Sovereign Power and a body politic.

IV.

At and during all times from some date in 1933 until August 31, 1947, James W. Mahoney was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon and is hereinafter referred to as "former collector, James W. Mahoney." At and during all times from September 1, 1947, until October 31, 1952, Hugh H. Earle was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the district of Oregon and is hereinafter referred to as "former collector, Hugh H. Earle."

V.

During the times herein mentioned Plaintiff kept his personal accounts and filed his personal income tax returns on a calendar year and cash receipts and disbursement basis.

VI.

During the calendar year 1946, Plaintiff's gross income was in the sum of \$66,662.26 and his net income was in the sum of \$65,790.16. On or about March 15, 1947, Plaintiff filed with the former collector, James W. Mahoney, at his office in Portland, Oregon, Plaintiff's United States Individual Income Tax Return, Form 1040, for the calendar year 1946, showing his total gross income in said sum of \$66,662.26 and a total tax liability of Plaintiff for the said year in the sum of \$36,456.66, which Plaintiff paid to former collector, James W. Mahoney.

VII.

On January 1, 1935, plaintiff and his wife, Lena Pierce, entered into a partnership agreement to carry on a business of manufacturing trailers in Portland, Multnomah County, Oregon, as partners under the name and style of L. H. Pierce Auto Service and to share the profits and losses of said business at all times from January 1, 1935, through December 31, 1948, as follows:

L. H. Pierce	50%
Lena Pierce	50%

and at all times from January 1, 1935, through December 31, 1948, said business was carried on, operated and conducted as a partnership by Plaintiff and his wife as partners in accordance with said agreement. During the calendar year 1948 the partnership sustained a loss of Four Thousand One Hundred Ninety Three and 12/100 (\$4,193.12) Dollars and Plaintiff's share of said loss was Two Thousand Ninety Six and 56/100 (\$2,096.56) Dollars. Said loss resulted from the operation of said partnership business of Plaintiff and his said partner.

VIII.

During the year 1948, Plaintiff sustained an operating loss of Two Thousand Ninety Six and 56/100 (\$2,096.56) Dollars, the same being his said distributive share of said operating loss sustained by said partnership, L. H. Pierce Auto Service. During the same year Plaintiff had a non-business casualty loss in the amount of Three Thousand Three Hun-

dred Ninety One and 47/100 (\$3,391.47) Dollars and received a salary of Three Thousand (\$3,000.00) Dollars. Under Section 122 of the Internal Revenue Code, (26 U.S.C.A. Sect. 122) the casualty loss completely offsets the salary in the amount of Three Thousand (\$3,000.00) Dollars. Plaintiff filed with the former collector, Hugh H. Earle, at his office in Portland, Oregon, Plaintiff's United States Individual Income Tax Return, Form 1040, for the year 1948 showing his said net operating loss in the year 1948 amounting to Two Thousand Ninety Six and 56/100 (\$2,096.56) Dollars.

IX.

Under Section 122 of the Internal Revenue Code and Section 23 (s) (26 U.S.C.A., Section 23 (s)) said operating loss of Plaintiff in the sum of Two Thousand Ninety Six and 56/100 (\$2,096.56) Dollars for the year 1948 becomes a net operating loss deduction in the calendar year 1946 and reduces Plaintiff's net taxable income in 1946 from \$65,790.16 to \$63,693.60, and reduces his income tax liability for said year from \$36,456.66 to \$34,903.11, a reduction in tax liability of One Thousand Five Hundred Fifty Three and 55/100 (\$1,553.55) with the result that the income taxes collected from Plaintiff for the year 1946 were excessive by said sum of One Thousand Five Hundred Fifty Three and 55/100 (\$1,553.55) Dollars.

X.

Said sum of One Thousand Five Hundred Fifty Three and 55/100 (\$1,553.55) Dollars has not been

repaid to the Plaintiff, nor has any part thereof been repaid to him, and Defendant now erroneously and wrongfully withholds from Plaintiff said sum of One Thousand Five Hundred Fifty Three and 55/100 (\$1,553.55) Dollars, and the whole thereof, together with interest thereon at the rate of six (6%) per cent per annum from January 1, 1949, as provided by law.

XI.

At or about the same time that Plaintiff filed his said tax return for the year 1948 and on or about the 15th day of March, 1949, he also duly filed with the former collector, Hugh H. Earle, in the collector's office in Portland, Oregon on Form 843, Plaintiff's claim for refund to him of said sum of One Thousand Five Hundred Fifty Three and 55/100 (\$1,553.55) Dollars. A copy of said claim marked "Exhibit A" is attached hereto and by this reference made a part hereof.

XII.

More than six (6) months have elapsed since the said claim was filed as aforesaid, and neither the Commissioner of Internal Revenue nor the Secretary of the Treasury of the United States, nor any delegate of his, has mailed by registered mail to the Plaintiff a notice of the disallowance of said claim or any part thereof.

Wherefore, Plaintiff demands judgment in the sum of One Thousand Five Hundred Fifty Three and 55/100 (\$1,553.55) Dollars, together with in-

terest at the rate of six (6%) per cent per annum from January 1, 1949, as provided by law and for his costs and disbursements herein incurred.

/s/ RANDALL JONES,

/s/ GARTHE BROWN,

/s/ MORRIS J. GALEN,

Attorneys for Plaintiff.

Of Counsel:

JACOB, JONES & BROWN.

State of Oregon,

County of Multnomah—ss.

I, L. H. Pierce, being first duly sworn, say that I am the Plaintiff in the within entitled action and that the foregoing Complaint is true as I verily believe.

/s/ L. H. PIERCE.

Subscribed and sworn to before me this 6th day of December, 1954.

[Seal] /s/ F. M. WACHSMUTH,

Notary Public for Oregon.

My Commission expires: December 6, 1954.

EXHIBIT A

Form 843

U. S. Treasury Department
Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form

☒ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.

Name of taxpayer or purchaser of stamps: L. H.
Pierce.

Residence: 6832 N. E. 107th Avenue, Portland,
Oregon.

1. District in which return (if any) was filed:
Portland, Oregon.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
1/1, 1946, to 12/31, 1946.

* * *

6. Amount to be refunded: \$1,553.55.

* * *

The claimant believes that this claim should be allowed for the following reasons:

By application of the Federal Carry Back Loss Rule to the Operating Loss of 1948 against the Net Operating Profit for the year of 1946.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ L. H. Pierce.

Dated....., 19..

L. H. Pierce,
6832 N. E. 107th Avenue,
Portland, Oregon.

Carry Back Analysis of 1948 Operating Loss
to the Calendar Year of 1946

Line 6 Form 1040 for Year 1946.....	\$66,662.26
Less: Less 1948 Operating Loss	2,096.56
	<u>Balance subject to tax</u>
	<u>\$64,565.70</u>
Amount of Tax Originally Paid.....	\$36,456.66
Amount of Tax Due on Above Balance	
Subject to Tax	34,903.11
	<u>Excess Tax Paid and Claimed as Refund \$ 1,553.55</u>

[Endorsed]: Filed December 8, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, the United States of America, by its attorney, Clarence Edwin Luckey, United States Attorney for the District of Oregon, in answer to the plaintiff's Complaint herein:

I.

Denies the allegations contained in said complaint not admitted, qualified or specifically referred to below.

II.

Further answering plaintiff's complaint:

1. Admits the allegations contained in paragraph I of the complaint.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the complaint.

3. Admits the allegations contained in paragraph III of the complaint.

4. Admits the allegations contained in paragraph IV of the complaint.

5. Admits the allegations contained in paragraph V of the complaint.

6. Denies the allegations contained in paragraph VI of the complaint but admits that on May 14, 1947, the plaintiff filed with the former Collec-

tor, James W. Mahoney, at Portland, Oregon, the plaintiff's federal income tax return, Form 1040, for the calendar year 1946, and disclosed thereon gross income in the total sum of \$66,662.26, a total tax liability of \$36,456.66. Defendant further admits that plaintiff paid the said tax to former Collector, James W. Mahoney.

7. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the complaint but admits that the alleged partnership filed a Treasury Department Form 1065 for the calendar year 1948 and showed thereon a loss of \$4,193.12. The said partnership return further disclosed that plaintiff's share of the alleged loss was \$2,096.56.

8. Denies the allegations contained in paragraph VIII of the complaint but admits that the plaintiff filed with the former Collector, Hugh H. Earle, at Portland, Oregon, the plaintiff's federal income tax return, Form 1040, for the year 1948, and showed thereon an amount alleged to be his share of the net operating loss of the alleged partnership in the amount of \$2,096.56. The return further showed that the plaintiff claimed a casualty loss in the amount of \$3,391.47 and that plaintiff had received a salary of \$3,000.

9. Denies the allegations contained in paragraph IX of the complaint.

10. Denies the allegations contained in paragraph X of the complaint but admits that no part of the sum of \$1,553.55 has been repaid to the plaintiff.

11. Denies the allegations contained in paragraph XI of the complaint but admits that on June 7, 1949, the plaintiff filed with the former Collector, Hugh H. Earle, at Portland, Oregon, a claim for refund on Form 843, for the sum of \$1,553.55. It is further admitted that a copy of the said claim is attached to the complaint as Exhibit A, but defendant denies all substantive allegations contained in the said claim for refund.

12. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XII of the complaint.

Affirmative Defense

If it is the decision of this Court that the plaintiff is entitled to a deduction under Section 122 of the Internal Revenue Code of 1939, then the plaintiff will be limited to a refund of \$1,346.49 instead of \$1,553.55, as claimed, for the reason that the plaintiff in computing his alleged operating loss deduction failed to take into consideration the non-taxable portion of his 1948 long term capital gains of \$279.43 each.

Wherefore, the defendant prays that the com-

plaint be dismissed with prejudice and the defendant be allowed its costs and disbursements.

C. E. LUCKEY,
United States Attorney for
the District of Oregon.

/s/ EDWARD J. GEORGEFF,
Assistant United States
Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 7, 1955.

In the United States District Court
for the District of Oregon
Civil No. 7828

L. H. PIERCE,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

Civil No. 7829

LENA L. PIERCE,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

PRE-TRIAL ORDER

The above-entitled actions came on regularly for pre-trial conference before the Honorable Gus J.

Solomon, Judge of the above-entitled Court on the 27th day of June, 1955, Plaintiffs appearing by Jacob, Jones & Brown and Morris J. Galen, their attorneys of record herein, and the Defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon, and being represented in Court by Richard M. Roberts, special assistant to the Attorney-General, Department of Justice, Washington, D. C.

Character of the Actions

It appearing from the pleadings and statement of counsel that in the above-entitled actions the plaintiffs seek to recover of and from the defendant sums of money which Plaintiffs allege the Defendant erroneously and wrongfully withholds from the Plaintiffs as income taxes and interest thereon for the calendar year, 1946, which sums of money Plaintiffs allege are wrongfully withheld by virtue of the Defendant's failure to recognize and allow to each of the Plaintiffs a net operating loss carry-back from the year 1948 to the year 1946.

Upon the proceedings had at the pre-trial hearing,

It Is Ordered that the above-entitled actions be and they are hereby consolidated for trial; and

Admitted Facts

It Is Ordered that the following facts are admitted by the parties and are accepted as stipulated facts in this case:

I.

Each of the above-captioned actions is a civil action and arises under the laws of the United States of America providing for internal revenue and jurisdiction rests upon Title 28, United States Code, Section 1346.

II.

During the years 1946 and 1948, each of the Plaintiffs was a resident and inhabitant of the County of Multnomah and State of Oregon, and was then and is now a citizen of the United States of America.

III.

Defendant now is and during all times herein mentioned was a sovereign power and body politic.

IV.

At and during all times from July 16, 1933 to August 31, 1947, James W. Maloney was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon.

V.

At and during all times from September 1, 1947, to October 30, 1952, Hugh H. Earle was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon.

VI.

During all times herein mentioned, Plaintiff, L. H. Pierce, kept his books and made and filed his tax returns on a calendar year and cash receipts and

disbursements basis.

VII.

During all times herein mentioned, Plaintiff, Lena L. Pierce, kept her books and made and filed her tax returns on a calendar year and cash receipts and disbursements basis.

VIII.

During the calendar year 1946, Plaintiff, L. H. Pierce, had a gross income in the sum of \$66,662.26 and net income in the sum of \$65,790.16. On or about March 15, 1947, Plaintiff, L. H. Pierce, filed with the former collector, James W. Maloney, at his office in Portland, Oregon, his United States Individual Income Tax Return, Form 1040, for the Calendar Year 1946, showing his total gross income in said sum of \$66,662.26, and a total tax liability for said year in the sum of \$36,456.66, which Plaintiff, L. H. Pierce, paid to the former collector, James W. Maloney. A copy of L. H. Pierce's United States Individual Income Tax Return for the year 1946 is Plaintiff's Pre-trial Exhibit 1.

IX.

During the calendar year 1946, Plaintiff, Lena L. Pierce, had a gross income in the sum of \$66,662.25 and net income in the sum of \$65,825.45. On or about March 15, 1947, Plaintiff, Lena L. Pierce filed with the former collector, James W. Maloney, at his office in Portland, Oregon, her United States Individual Income Tax Return, Form 1040, for the calendar year 1946, showing her total

gross income in said sum of \$66,662.25, and a total tax liability for said year in the sum of \$36,112.31, which Plaintiff, Lena L. Pierce, paid to the former collector, James W. Maloney. A copy of Lena L. Pierce's United States Individual Income Tax Return for the year 1946 is Plaintiffs' Pre-trial Exhibit 2.

X.

On January 1, 1935, L. H. Pierce and Lena L. Pierce, the Plaintiffs herein, entered into a partnership agreement pursuant to which they engaged in business as partners, in and about Portland, Multnomah County, Oregon, under the name and style of L. H. Pierce Auto Service. The said partnership engaged in the manufacture of trailers and in other related and unrelated business activity. Plaintiffs shared the profits and losses of said business at all times from January 1, 1935, through December 31, 1948, as follows:

L. H. Pierce	50%
Lena L. Pierce	50%

XI.

On or about April 2, 1947, Pierce Trailer & Equipment Co., an Oregon corporation, was organized, with each of the Plaintiffs owning fifty (50%) per cent of the issued and outstanding stock of said corporation. The corporation engaged in the trailer business, and after the organization of the corporation, the partnership ceased engaging in the trailer business, but continued to conduct business operations not connected with those of the

corporation. After April 2, 1947, the partnership owned property which it leased to the corporation and continued its farming operations.

XII.

During the calendar year 1948, the partnership sustained a net operating loss of \$4,193.12 and thereby each of the Plaintiffs sustained an operating loss of \$2,096.56. A copy of the partnership's United States Partnership Return of Income, Form 1065, for the year 1948 is Plaintiffs' Pre-trial Exhibit 3.

XIII.

During the calendar year 1948, L. H. Pierce received a salary of \$6,000.00 from Pierce Trailer & Equipment Co., which salary was reported for Federal Income Tax purposes in the amount of \$3,000.00 by each of the Plaintiffs. A copy of the corporation's United States Corporation Income Tax Returns, Form 1120, for the fiscal years ending March 31, 1948, and March 31, 1949, are Defendant's Pre-trial Exhibits 1 and 2 respectively.

XIV.

During the year 1948, each of the Plaintiffs had a non-business casualty loss in the amount of \$3,391.47.

XV.

L. H. Pierce filed with the former collector, Hugh H. Earle, at his office in Portland, Oregon, his United States Individual Income Tax Return, Form 1040, for the year 1948, showing his said net oper-

ating loss in the year 1948 amounting to \$2,096.56. A copy of L. H. Pierce's United States Individual Income Tax Return for the year 1948 is Plaintiff's Exhibit 4.

XVI.

Lena L. Pierce filed with the former collector, Hugh H. Earle, at his office in Portland, Oregon, her United States Individual Income Tax Return, Form 1040, for the year 1948, showing her said net operating loss in the year 1948 amounting to \$2,096.56. A copy of Lena L. Pierce's United States Individual Income Tax Return for the year 1948 is Plaintiffs' Exhibit 5.

XVII.

On or about the 7th day of June, 1949, L. H. Pierce duly filed with the former collector, Hugh H. Earle, in the Collector's Office in Portland, Oregon, on Form 843, his claim for refund to him of the sum of \$1,553.55. A copy of said claim is marked Plaintiff's Pre-trial Exhibit 6. More than Six (6) months have elapsed since the date said claim was filed as aforesaid, and the Commissioner of Internal Revenue has rendered no decision thereon.

XVIII.

Said sum of \$1,553.55 has not been repaid to Plaintiff, L. H. Pierce, nor has any part thereof been repaid to him.

XIX.

On or about the 7th day of June, 1949, Lena L. Pierce duly filed with the former collector, Hugh H. Earle, in the Collector's Office in Portland, Ore-

gon, on Form 843, her claim for refund to her of the sum of \$1,553.55. A copy of said claim is marked Plaintiffs' Pre-trial Exhibit 7. More than Six (6) months have elapsed since the date said claim was filed as aforesaid, and the Commissioner of Internal Revenue has rendered no decision thereon.

XX.

Said sum of \$1,553.55 has not been repaid to the Plaintiff, Lena L. Pierce, nor has any part thereof been repaid to her.

Issues

Issues of Fact:

1. There are no issues of fact to be tried by the court.

Issues of Law:

1. Whether under Section 122 of the Internal Revenue Code of 1939 and Section 23 (s) (26 U.S.C.A. Section 23 (s)) the said operating loss sustained by L. H. Pierce in the sum of \$2,096.56 for the year 1948 became a net operating loss deduction in the calendar year 1946 and reduced L. H. Pierce's net taxable income in 1946 from \$65,-790.16 to \$63,693.60, and reduced his income tax liability for said year from \$36,456.66 to \$34,903.11, a reduction in tax liability of \$1,553.55.

2. Whether under Section 122 of the Internal Revenue Code of 1939 and Section 23 (s) (26 U.S.C.A. Section 23 (s)) the said operating loss sustained by Lena L. Pierce in the sum of \$2,-

096.56 for the year 1948 became a net operating loss deduction in the calendar year 1946 and reduced Lena L. Pierce's net taxable income in 1946 from \$65,825.45 to \$63,728.89, and her income tax liability for said year from \$36,112.31 to \$34,558.76, a reduction in tax liability of \$1,553.55.

3. Whether the salary income received by L. H. Pierce from Pierce Trailer & Equipment Co., was income from trade or business to L. H. Pierce and Lena L. Pierce.

4. Whether Plaintiffs' non-business casualty loss deductions can be used to offset the salary income received by L. H. Pierce.

5. Whether Plaintiff, L. H. Pierce, is entitled to recover from the Defendant the sum of \$1,553.55, together with interest thereon at the rate of six (6%) per cent per annum from January 1, 1949, as provided by law, together with his costs and disbursements in case No. 7828.

6. Whether Plaintiff, Lena L. Pierce, is entitled to recover from the Defendant the sum of \$1,553.55, together with interest thereon at the rate of Six (6%) per cent per annum from January 1, 1949, as provided by law, together with her costs and disbursements in case No. 7829.

Exhibits

It Is Ordered that the parties hereto may offer in evidence at the trial of this action any and all of the following pre-trial exhibits without further

identification or authentication, but subject to any and all objections on other grounds:

Plaintiff's Exhibits

1. Copy of Plaintiff, L. H. Pierce's, United States Individual Income Tax Return for the calendar year 1946.

2. Copy of Plaintiff, Lena L. Pierce's, Individual Income Tax Return for the calendar year 1946.

3. Copy of the United States Partnership Income Tax Return of L. H. Pierce Auto Service for the year 1948.

4. Copy of Plaintiff, L. H. Pierce's, United States Individual Income Tax Return for the calendar year 1948.

5. Copy of Plaintiff, Lena L. Pierce's, United States Individual Income Tax Return for the calendar year 1948.

6. Copy of Plaintiff, L. H. Pierce's, Refund Claim for the year 1946 in the sum of \$1,553.55.

7. Copy of Plaintiff, Lena L. Pierce's, Refund Claim for the year 1946 in the sum of \$1,553.55.

Defendant's Exhibits

1. Copy of the corporation's United States Corporation Income Tax Return for the fiscal year ending March 31, 1948.

2. Copy of the corporation's United States Corporation Income Tax Return for the fiscal year ending March 31, 1949.

It Is Ordered that the above-entitled Court has jurisdiction of the parties and the subject matter of this action.

The foregoing is certified to be a record of the proceedings had at the pre-trial of this case; and

It Is Ordered that the questions to be tried herein shall be as hereinabove set forth; and

It Is Further Ordered that this Pre-trial Order shall not be changed or additions made thereto, except by written agreement of the parties, acting through their respective attorneys, or upon order of the court to prevent manifest injustice.

Dated at Portland, Oregon, this 5th day of July, 1955.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ MORRIS J. GALEN,
Of Attorneys for Plaintiffs.

/s/ RICHARD W. ROBERTS,
Of Attorneys for Defendant.

Lodged July 1, 1955.

[Endorsed]: Filed July 5, 1955.

[Title of District Court and Cause.]

Civil Action Nos. 7828 and 7829

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled actions came on regularly for trial before the Honorable William G. East, Judge of the above-entitled Court, on the basis of stipulated facts contained in a pre-trial order, including exhibits, filed in this Court onand briefs having been filed by the respective parties, the findings of fact and conclusions of law follow:

Findings of Fact

I.

Plaintiff, Lena L. Pierce, is involved here solely by virtue of her being the wife of plaintiff, L. H. Pierce, during the pertinent years. The plaintiffs filed separate individual income tax returns for the relevant years. Plaintiff, Lena L. Pierce, is involved in this proceeding because, under Oregon community property law, she reported one-half of the items here at issue on her federal income tax return as her share of the community property.

II.

Each of the above captioned actions is a civil action and arises under the laws of the United States of America providing for internal revenue and jurisdiction rests upon Title 28, United States Code, Section 1346.

III.

During the years 1946 and 1948, each of the plaintiffs was a resident and inhabitant of the County of Multnomah and State of Oregon, and was then and is now a citizen of the United States of America.

IV.

During all times herein mentioned, plaintiff, L. H. Pierce, kept his books and made and filed his tax returns on a calendar year and cash receipts and disbursements basis.

V.

During all times herein mentioned, plaintiff, Lena L. Pierce, kept her books and made and filed her tax returns on a calendar year and cash receipts and disbursements basis.

VI.

During the calendar year 1946, plaintiff, L. H. Pierce, had a gross income in the sum of \$66,662.26 and net income in the sum of \$65,790.16. On or about March 15, 1947, plaintiff, L. H. Pierce, filed with the former collector, James W. Maloney, at his office in Portland, Oregon, his United States Individual Income Tax Return, Form 1040, for the calendar year 1946, showing his total gross income in said sum of \$66,662.26, and a total tax liability for said year in the sum of \$36,456.66, which plaintiff, L. H. Pierce, paid to the former collector, James W. Maloney.

VII.

During the calendar year 1946, Plaintiff, Lena L. Pierce, had a gross income in the sum of \$66,662.25

and net income in the sum of \$65,825.45. On or about March 15, 1947, plaintiff, Lena L. Pierce filed with the former collector, James W. Maloney, at his office in Portland, Oregon, her United States Individual Income Tax Return, Form 1040, for the calendar year 1946, showing her total gross income in said sum of \$66,662.25, and a total tax liability for said year in the sum of \$36,112.31, which plaintiff, Lena L. Pierce, paid to the former collector, James W. Maloney.

VIII.

On January 1, 1935, L. H. Pierce and Lena L. Pierce, the plaintiffs herein, entered into a partnership agreement pursuant to which they engaged in business as partners, in and about Portland, Multnomah County, Oregon, under the name and style of L. H. Pierce Auto Service. The said partnership engaged in the manufacture of trailers and in other related and unrelated business activity. Plaintiffs shared the profits and losses of said business at all times from January 1, 1935, through December 31, 1948, as follows:

L. H. Pierce	50%
Lena L. Pierce	50%

IX.

On or about April 2, 1947, Pierce Trailer & Equipment Co., an Oregon corporation, was organized, with each of the plaintiffs owning Fifty (50%) per cent of the issued and outstanding stock of said corporation. The corporation engaged in the

trailer business, and after the organization of the corporation, the partnership ceased engaging in the trailer business, but continued to conduct business operations not connected with those of the corporation. After April 2, 1947, the partnership owned property which it leased to the corporation and continued its farming operations.

X.

During the year 1948 the partnership, L. H. Pierce Auto Service, sustained a net operating loss of \$4,193.12. One-half, or \$2,096.56 was sustained by each of the plaintiffs as partners and was reported by them on their separate 1948 Federal income tax returns. L. H. Pierce was president of Pierce Trailer & Equipment Co. in 1948. During 1948 L. H. Pierce received a salary of \$6,000.00 from Pierce Trailer & Equipment Co. One-half or \$3,000.00 of this salary was reported on the separate 1948 Federal income tax returns of each of the plaintiffs on their separate returns.

XI.

Plaintiff L. H. Pierce, as president of Pierce Trailer & Equipment Co. received a salary of \$6,000.00 from the corporation in 1948. One-half, or \$3,000.00, was reported on their separate 1948 Federal income tax returns by each of the plaintiffs.

XII.

During the year 1948, each of the plaintiffs incurred a non-business casualty loss in the amount

of \$3,391.47, which they deducted on their separate 1948 Federal income tax returns.

XIII.

On or about the 7th day of June, 1949, L. H. Pierce and Lena L. Pierce each duly filed with the former collector, Hugh H. Earle, in the Collector's Office in Portland, Oregon, on Form 843, their separate claims for refund for the year 1946 each in the amount of \$1,553.55, alleging an overpayment of income tax based upon a net operating loss carry-back from 1948 in the amount of \$2,096.56 resulting from the operation of the partnership.

XIV.

Said sum of \$1,553.55 has not been repaid to plaintiff, L. H. Pierce, nor has any part thereof been repaid to him.

XV.

Said sum of \$1,553.55 has not been repaid to the plaintiff, Lena L. Pierce, nor has any part thereof been repaid to her.

Conclusions of Law

I.

In 1948, only one-half of the \$6,000.00 or \$3,000.00 received by plaintiff, L. H. Pierce, from Pierce Trailer & Equipment Co., Inc., as salary for services rendered to the corporation as president was income received by him in the operation of a trade or business. Accordingly, in the computation of

the net operating loss deduction under Section 122 of the Internal Revenue Code of 1939 the \$3,000.00 received and reported by plaintiff, L. H. Pierce, in 1948, from Pierce Trailer & Equipment Co., Inc., must be offset against his distributable share of the operating loss in the amount of \$2,096.56 of the L. H. Pierce Auto Service partnership.

II.

The plaintiff, L. H. Pierce, is not entitled to any net operating loss deduction for the year 1946 under the provisions of Section 23 (a) of the Internal Revenue Code of 1939. His complaint must be dismissed with prejudice.

III.

The \$3,000.00 reported by plaintiff, Lena L. Pierce, in 1948, under the community property law of the State of Oregon representing one-half of the salary paid to her husband, L. H. Pierce, by Pierce Trailer & Equipment Co., Inc., in 1948 for his services as president did not constitute income to her from her trade or business.

IV.

Plaintiff, Lena L. Pierce, is entitled in the computation of the net operating loss deduction under section 122 of the Internal Revenue Code of 1939 for the year 1946 to treat the \$3,000.00 reported by her in 1948 as representing one-half of the salary of plaintiff L. H. Pierce as income not attributable to a trade or business.

V.

Plaintiff, Lena L. Pierce, is entitled to a deduction for the year 1946 under Section 23 (a) of the Internal Revenue Code of 1939 in the amount of \$2,096.56 as a net operating loss carry-back from the year 1948.

VI.

Plaintiff, Lena L. Pierce, is entitled to judgment accordingly.

/s/ WILLIAM G. EAST,
United States District Judge.

Dated: October 8, 1956.

[Endorsed]: Filed October 8, 1956.

In the United States District Court
for the District of Oregon

Civil Action No. 7828

L. H. PIERCE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter came on regularly by trial before the undersigned Judge of the above-entitled Court, the plaintiff appearing by Morris J. Galen, of his attorneys, and the defendant appearing by C. E.

Luckey, United States Attorney for the District of Oregon, Edward J. Georgeff, Assistant United States Attorney, and Walter B. Langley, Special Assistant to the Attorney General, of defendant's attorneys, and the Court having entered its pre-trial order herein, in which no issues of fact were raised and having entered Findings of Fact and Conclusions of Law, and the Court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed, that judgment is entered for the defendant and plaintiff's complaint is dismissed with prejudice.

Dated this 29th day of October, 1956.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed October 29, 1956.

In the United States District Court
for the District of Oregon
Civil Action No. 7829

LENA L. PIERCE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter came on regularly by trial before the undersigned Judge of the above-entitled Court,

the plaintiff appearing by Morris J. Galen, of her attorneys, and the defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon, Edward J. Georgeff, Assistant United States Attorney, and Walter B. Langley, Special Assistant to the Attorney General, of defendant's attorneys, and the Court having entered its pre-trial order herein, in which no issues of fact were raised and having entered Findings of Fact and Conclusions of Law, and the Court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed, that judgment be, and the same is, hereby entered for plaintiff and against the defendant in the sum of One Thousand Five Hundred Fifty Three and 55/100 dollars (\$1,553.55), together with interest thereon at the rate of six per cent per annum from the 7th day of June, 1949, and

It Is Further Ordered, Adjudged and Decreed, that plaintiff have and recover of and from the defendant, her costs and disbursements herein taxed at \$.....

Dated this 29th day of October, 1956.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed October 29, 1956.

[Title of District Court and Cause.]

Civil Action No. 7828

NOTICE OF APPEAL

Notice is hereby given that L. H. Pierce, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 29, 1956.

/s/ MORRIS J. GALEN,
Of Attorneys for Plaintiff,
L. H. Pierce.

[Endorsed]: Filed December 5, 1956.

[Title of District Court and Cause.]

Civil 7829

NOTICE OF APPEAL

To: Lena L. Pierce, Plaintiff, and Jacob, Jones & Brown, Attorneys for Plaintiff:

Notice Is Hereby Given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 29th day of October, 1956, in favor of plaintiff and against defendant.

Dated December 5, 1956.

C. E. LUCKEY,

United States Attorney,
District of Oregon;

/s/ EDWARD J. GEORGEFF,

Assistant United States Attorney, of Attorneys for
Defendant.

[Endorsed]: Filed December 5, 1956.

[Title of District Court and Cause.]

Civil Action No. 7828

COST BOND

Know All Men by These Presents, that the Aetna Casualty and Surety Company, of Hartford Connecticut, a corporation organized and existing under the laws of the State of Connecticut and authorized to transact the business of Surety in the State of Oregon is held and firmly bound unto The United State of America, the defendant in the above-entitled action, in the penal sum of Two Hundred Fifty and No/100 (250.00) Dollars, lawful money of the United States of America for the payment of which well and truly to be made it binds itself, heirs and successors.

Upon condition, nevertheless, that

Whereas, L. H. Pierce, the plaintiff in the above-entitled action, has appealed to The United States

Court of Appeals for the 9th District from the Judgment made and entered in the said action in the said District Court in favor of the defendant and against the plaintiff in the said action on the 29th day of October, 1956.

Now, if L. H. Pierce shall well and truly pay all costs and disbursements that may be awarded by the said United States Court of Appeals for the 9th Circuit; if the appeal be dismissed or the judgment affirmed or modified, then this obligation to be null and void; otherwise to remain in full force and effect.

Signed, sealed and dated this 5th day of December, 1956.

[Seal]

THE AETNA CASUALTY AND
SURETY COMPANY,

By /s/ S. R. WALSH,
Res. Vice-President.

Attest:

/s/ G. TURNER,
Res. Asst. Secretary.

[Endorsed]: Filed December 5, 1956.

[Title of District Court and Cause.]

Civil No. 7828

ORDER

This matter coming on to be heard ex parte upon motion of plaintiff for an order extending time for

the filing of the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, to enable the attorneys for the plaintiff to have additional time to consider said appeal, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the record on appeal and docketing the within action be and it is hereby extended to 90 days from the 5th day of December, 1956, the date of filing of the Notice of Appeal.

Dated this 14th day of January, 1957.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer: Pre-trial order (also in Civ. 7829); Findings of fact and conclusions of law (also in Civ. 7829); Judgment; Notice of appeal; Cost bond; Order extending time to docket appeal; Designation

of record and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7828, in which L. H. Pierce is the plaintiff and appellant and The United States of America is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the exhibits will be forwarded at a later date.

And I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 28th day of February, 1957.

[Seal]

R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15461. United States Court of Appeals for the Ninth Circuit. L. H. Pierce, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed March 4, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Endorsed]: No. 15462. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Lena L. Pierce, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed March 4, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15461

L. H. PIERCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The above-named Appellant, L. H. Pierce, intends to rely on the following points on his appeal to the United States Court of Appeals for the Ninth Circuit, to wit:

1. The Trial Court erred in making its conclusions of law I and II in that they are each contrary to the law governing this case.

2. The Trial Court erred in rendering judgment, dismissing Appellant's Complaint with prejudice, in that said judgment is contrary to the law governing this case.

Dated this 20th day of March, 1957.

/s/ MORRIS J. GALEN,

Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed March 22, 1957.

[Title of Court of Appeals and Cause.]

No. 15462

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 17 (6) of this Court the appellant, United States of America, hereby files the following statement of points on which it intends to rely:

1. The District Court erred in holding that where the activities of the appellee's husband in 1948 were sufficient to constitute the operation of a trade or business and where, under the community property law of the State of Oregon, one-half of the income attributable to the operation of such trade or business was reported by the appellee on her 1948 individual federal income tax return, that such income did not constitute trade or business income to the appellee.

2. The District Court erred in holding that the appellee, in the computation of the net operating loss deduction under Section 122 of the Internal Revenue Code of 1939 for the year 1946, was entitled to treat as non-business income the amount reported by her in 1948 which was attributable to the activities of her husband in the operation of a trade or business.

3. The District Court erred in holding that appellee was entitled to a deduction for the year 1946 under Section 23 (a) of the Internal Revenue Code of 1939 in the amount of \$2,096.56 as a net operating loss carry-back from the year 1948.

4. The District Court erred in ordering judgment for the appellee in the amount of \$1,553.55.

Dated: March 29, 1957.

/s/ CLARENCE E. LUCKEY,
United States Attorney.

Service of copy acknowledged.

[Endorsed]: Filed April 1, 1957.

In the United States Court of Appeals
for the Ninth Circuit

No. 15461

L. H. PIERCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15462

UNITED STATES OF AMERICA,

Appellant,

vs.

LENA L. PIERCE,

Appellee.

STIPULATION FOR CONSOLIDATION AND
SUBMISSION OF CASES ON A COMMON
PRINTED RECORD, BRIEFS, HEARING
AND ARGUMENT

The above-entitled cases having been consolidated for submission to the District Court on a common pre-trial order and briefs, and the Court's letter

decisions and Findings of Fact and conclusions of Law being applicable to both cases, plaintiff appealing the adverse decision in one of the cases and defendant United States appealing the adverse decision in the other case.

It Is Hereby Stipulated by and between the parties, through their respective attorneys, subject to the approval of the Court, that the cases may be consolidated on appeal and submitted on a common printed record, the expenses of printing said record to be shared equally, briefs, hearing and argument, the first brief to be filed by the government, which brief will be directed to the issues of both cases.

Dated this 29th day of March, 1957.

C. E. LUCKEY,

United States Attorney,
District of Oregon;

/s/ EDWARD J. GEORGEFF,
Assistant United States
Attorney;

JACOB, JONES & BROWN,

/s/ MORRIS J. GALEN.

So Ordered.

/s/ WILLIAM DENMAN,
Chief Judge;

/s/ WALTER L. POPE,

/s/ FREDERICK G. HAMLEY,
United States District Judges.

[Endorsed]: Filed April 1, 1957.